No. 91-203

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARSON WAYNE NEWTON, AKA: WAYNE NEWTON,

Petitioner,

—v.—

NATIONAL BROADCASTING COMPANY, INC., BRIAN ELLIOT ROSS, IRA SILVERMAN and PAUL GREENBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Did the Court of Appeals err in determining that the evidence in a libel trial commenced by a public figure against a broadcaster and its employees failed to demonstrate actual malice with convincing clarity when virtually all of the facts broadcast were uncontroverted and there was no basis for concluding that the journalists who prepared the broadcast doubted the truth of what they broadcast or deliberately left a false impression about the plaintiff?

Parties Below

The parties to the proceedings below were Carson Wayne Newton, a/k/a Wayne Newton, plaintiff, and National Broadcasting Company, Inc., Brian Ross, Ira Silverman and Paul Greenberg, defendants.

Pursuant to Supreme Court Rule 29.1, National Broadcasting Company, Inc. ("NBC") advises the Court that it is a wholly-owned subsidiary of National Broadcasting Company Holding, Inc., which is a wholly-owned subsidiary of General Electric Company. NBC has no affiliates or subsidiaries other than wholly-owned subsidiaries, with the exception of the following:

(a) a wholly-owned subsidiary of NBC, NBC Cable Holding, Inc., owns a number of wholly-owned subsidiaries each of which has an interest in a number of cable-related companies, with the remaining interest in such companies being owned by unrelated companies.

(b) a wholly-owned subsidiary of NBC, NBC News Overseas, Inc., has a 37.5% interest in Visnews, Limited, with the other 62.5% interest being held by Reuters Limited and British Broadcasting Corporation.

(c) NBC has an 81.25% interest in Mobile Image Limited, a U.K. company.

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STATEMENT OF THE CASE

On October 6, 1980, NBC News ("NBC") broadcast on its Nightly News program a report about an ongoing federal investigation of the relationship of two leading organized crime figures with Wayne Newton ("Newton"), a Las Vegas entertainer who had recently been licensed to operate a casino in that city. Prepared over a three-month period by two NBC journalists, Brian Ross ("Ross") and Ira Silverman ("Silverman"), the report raised serious questions both about Newton's relationships with organized crime figures and about the truth of Newton's testimony before the Nevada gaming authorities about those relationships.

Newton sued for libel on April 10, 1981, in the United States District Court for the District of Nevada sitting in Las Vegas. On December 17, 1986, after a trial lasting 37 trial days, a jury found NBC, Ross, Silverman and Paul Greenberg (the executive producer of the broadcast) liable for defaming Newton. The jury awarded Newton $19,271,750 in damages (over $22 million when pre-judgment interest was added) consisting of $9,046,750 for loss of past and future income, $5 million for loss of reputation, $225,000 for physical and mental suffering and $5 million in punitive damages. (A 5-7)[1]

In response to defendants' motion for judgment notwithstanding the verdict and in the alternative for a new trial, the district court upheld the jury's verdict of liability and its awards of damages for pain and suffering and punitive damages. It set aside the damages for lost past and future income, ruling that Newton "failed to establish by a preponderance of the evidence that the broadcasts in question had any causal connection to any alleged loss of past or future income" (A 82), and also the $5 million for damage to Newton's reputation, stating that the award "shocks the conscience of the court because the broadcasts did not tarnish [Newton's] outstanding reputation." (A 17, 80) The district court directed Newton to file a remittitur of all sums except $5,275,000 or participate in a new trial on liability and damages which, in the interests of justice, would take place in the Central District of California. (A 75, 83; ER 304-05)[2] "Put to

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1 The following abbreviations are used in this brief: "Pet." for the petition for a writ of certiorari, "A" for the appendix to the petition for a writ of certiorari, "ER" for the Excerpts of Record filed with the Court of Appeals, "RT_____:_____" for the volume and page of the reporter's transcript of the trial proceedings and "Ex. _____" for the exhibits admitted into evidence at trial.

2 NBC and its journalists had repeatedly moved for a change of venue from Las Vegas to any other judicial district where the case could have been brought, including the Central District of California, on the ground that Newton's unparalleled popularity in Las Vegas would prevent them from receiving a fair trial in that venue. (A 6; ER 157, 184-

the choice," as the Court of Appeals later phrased it, "of a new trial outside Las Vegas or filing the remittitur, Newton filed the remittitur." (A 8)

The Court of Appeals for the Ninth Circuit (Chief Judge Goodwin and Judges Nelson and Norris), in a unanimous opinion dated August 30, 1990, reversed the judgment and ordered judgment entered dismissing the complaint. (A 1-60) The Court's opinion was based, in its entirety, on the failure of Newton to prove that NBC had broadcast its reports with actual malice.[3] Applying the test frequently reasserted by this Court that actual malice is proveable in a public figure libel case only by clear and convincing evidence that the defendant "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement," *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 511 n.30 (1984); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989), the Court determined that there was "almost no evidence of actual malice, much less clear and convincing proof." (A 60)

The Court of Appeals first considered the appropriate standard of review of the jury's finding of actual malice. Determining that all credibility findings of the jury were entitled to "special deference" and that "the presumption of correctness" applied "with less force when a factfinder's findings rely on its weighing of evidence and drawing of inferences" (A 15), the Court reviewed in laborious detail the evidence on the question of actual malice. (A 19-59) Much of that evi-

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85) Notwithstanding that all visitors who arrive at the airport in Las Vegas are obliged to drive on Wayne Newton Boulevard as they head towards the city (RT 6:936, 8:1310-11), that Wayne Newton Day has been celebrated by the city (*id.*), and that undisputed polling results indicated that NBC could not receive a fair trial in Las Vegas (ER 154-55) because Newton is (as the Court of Appeals later determined) so "revered" there (A 17), the district court denied the motions. (A 6; ER 157, 184-85)

3 NBC had made a number of other arguments for reversal which, as a result of the dispositive nature of the Court of Appeals' ruling, the Court did not reach. (A 8 n.5)

dence, the Court pointed out, was not in dispute (A 19) since "almost all of the facts reported by NBC in the October 6, 1980 broadcast are uncontroverted." (A 39)[4]

Reviewing the entirety of the evidence, the Court concluded that Newton had failed to prove actual malice. Newton's argument—repeated in his petition to this Court—that NBC had deliberately left a false impression about him was rejected on the basis of a total failure of proof. (A 40-59) Based on the entirety of the record and without making any credibility judgments of its own, the Court reversed the judgment of the district court.

Newton then petitioned for rehearing with a suggestion for rehearing en banc. On April 5, 1991, the panel amended its opinion in a few minor respects, and unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. (A 61-63) The full Court of Appeals was advised of the suggestion for en banc rehearing, but no judge requested a vote on this suggestion. (A 63-64) Newton then filed his petition to this Court for a writ of certiorari.

STATEMENT OF FACTS

"For the most part," the Court of Appeals correctly observed, "the facts in this case are not in dispute." (A 19) Those facts related to Newton's relationships with highly placed figures in organized crime, investigations by the FBI and Nevada authorities about those relationships, and the preparation of a television news report by NBC News about the same topic.

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4 By way of example, key exhibits in the case included a tape of Newton's interview with Nevada gaming investigators, his taped testimony before the Nevada Gaming Board and the transcript of his grand jury testimony. (A 21 n.21, 23, 102-22)

The Wayne Newton-Guido Penosi Relationship

During the first half of 1980, the Federal Bureau of Investigation ("FBI") was investigating Frank Piccolo ("Piccolo"), a high level Connecticut mob leader in the Gambino organized crime "family." (RT 28:5983, 13:2369-72; Ex. 613 at 4) Pursuant to judicial authorization, the FBI overheard Piccolo's telephone conversations including ones between Piccolo and his cousin Guido Penosi ("Penosi"). Penosi was a leading narcotics dealer in Southern California who was associated with both the Gambino and Lucchese organized crime families and who had (after his conviction for murder as a juvenile) twice been convicted of felonies. (RT 24:5217-19; Ex. 639) The topic of some of the conversations of these two mob leaders was Wayne Newton and his projected purchase of the Aladdin Hotel and Casino in Las Vegas, Nevada (the "Aladdin").

By 1980, Newton had achieved extraordinary national recognition as an entertainer, with his fame reaching unprecedented heights in Las Vegas where he resided and performed in hotel showrooms. (Exs. 853-54) Prior to 1980, Newton had had a long and close relationship with Penosi:

> —In the 1960's, Penosi attended Newton's performances at the Copacabana Club in New York a couple of times a week over a six-month period; they spoke often and Penosi provided a form of protection for Newton, keeping people he did not know away from him. (RT 3:355-64; Ex. ABP at 39)
>
> —During that period, Penosi and Carmine Tramunti, who became the boss of the Lucchese family, gave Newton an inscribed watch worth between $2,000 and $2,500. (RT 3:395-97, 28:5778; Ex. 457)
>
> —Newton and Penosi dined together in Florida, both at Penosi's home and in a restaurant. (A 19-20; RT 3:371-99, 6:974)
>
> —Penosi attended the wedding of Newton's brother in Las Vegas, met with Newton on that occasion and with

Newton's parents (on a visit to Newton's home) on another occasion. (A 19; RT 3:401-03, 6:974, 11:2023)

—Newton's office calendar noted Penosi's birthday. (A 19)

—In 1976, Newton flew to Los Angeles in his private plane with his manager, conductor and three members of his band, to perform without compensation on a television pilot being produced by Penosi's son. (A 20; RT 3:380-82, 6:980-81) Penosi thanked Newton profusely for this favor and offered to help Newton in the future. (ER 229; RT 6:980-82)

—In 1979, in another favor to Penosi, Newton advised the Las Vegas police of a forthcoming visit by Penosi so that Penosi could avoid having to register with the police (as required by law for all ex-felons). (A 20; RT 6:984-85)

—Newton initially invited Penosi to stay at his home during Penosi's 1979 visit to Las Vegas, but then arranged for him to stay without paying at a hotel. During his visit, Penosi saw Newton in his dressing room, was driven to Newton's home in a car Newton provided, talked with Newton there, and brought a saddle as a present for Newton's daughter. (A 20 & n.18, RT 3:366-68, 6:986-90, 9A:62A, 67A-69A)

In 1980, Newton secretly took up Penosi on his long-standing offer of help. After Newton refused to make further payments which he had allegedly promised to make in connection with an investment in a Las Vegas tabloid, Newton had a physical altercation with the tabloid's publisher and another man who was involved in organized crime. (A 53-54) Shortly after, telephone threats directed at Newton and his daughter began to be made by a man named Dapper, himself involved in organized crime. When the Las Vegas police were unable to stop the threats, Newton, rather than contacting the FBI or any other police entity, contacted his old friend, Guido Penosi. (A 20 & n.19)

Penosi, in turn, told Newton to call his cousin, "Frank," in Connecticut, and Newton called Frank Piccolo to enlist his aid. From the FBI recordings of Piccolo's telephone conversations, it was learned that Piccolo went to a "sit down" in the Bronx, New York, with members of the Genovese crime family where it was agreed that those threatening Newton would leave him alone. The threats against Newton ceased. (A 20-21 & n.20) Penosi then came to Las Vegas and visited with Newton in his dressing room. Newton, who believed that Penosi had saved his daughter's life, thanked Penosi for his help. (A 21-22)

Around the same time, Mark Moreno ("Moreno"), Newton's long-time friend and business associate, began receiving similar threats. Moreno went to Newton, who told him to call Penosi. (A 22) He did so and Penosi in turn told Moreno to call Piccolo. Moreno did so and when Piccolo said "there is other people that I must speak to about this," Moreno saw himself "being the center of discussion in a room filled with a lot of mob people." (RT 15:2800-01) A few days later, Penosi asked Newton to call Piccolo to verify that Moreno was "with" him. Once again, Newton called Piccolo to ask for his assistance. Again, Piccolo met with members of the Genovese family and an agreement was reached for Penosi personally to pay $3,500 to have the threats against Moreno called off. The threats against Moreno then ceased. (A 22 & n.22)

Having done a major favor for Newton, Piccolo began to seek to "earn" from Newton. He did so first by pressing Moreno to buy life insurance for Lola Falana, a Las Vegas entertainer who was a friend of Newton's and was then being managed by Moreno, through an insurance agent introduced to Moreno by Piccolo.[5] (A 22-23) Moreno tried to stall

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5 As Piccolo phrased it in a telephone call to Penosi: "We'll earn it back with the guy. First of all, on the insurance guy, something should come back . . . ." (Ex. 328 at 8) On another taped telephone call, Piccolo expressed his intentions more bluntly: "I want to earn on any fucking thing . . . . Whatever he earns, he's got to give us a piece, any fucking thing he earns." (ER 193) Throughout their

because he feared that he was becoming involved with Piccolo whom he understood was involved in organized crime. (RT 15:2804-05) Moreno told Newton about the efforts to pressure him to buy insurance and that it was "a *quid pro quo*, as a favor" for the help the organized crime figures had given to Newton and Moreno. (ER 225-26; RT 7:1078-80)

NBC's Investigation

Wayne Newton's decision to seek the assistance of highly placed organized crime figures ultimately led not only to the FBI learning of his communications with the mobsters but also to NBC doing so. In early July 1980, Ross and Silverman, two NBC journalists who specialized in investigative reporting on organized crime, learned of the ongoing investigation of Piccolo. They learned that wiretaps existed of conversations between Piccolo and Penosi about Newton and Moreno. The reporters were told that the conversations (as the Court of Appeals put it) "seemed to involve Wayne Newton and the Aladdin Hotel. Federal law enforcement officials were interested in investigating the connection between high-level Mafia figures and Newton's contemplated purchase of the Aladdin." (A 23)

Ross and Silverman traveled to Las Vegas where they continually sought—unsuccessfully—to interview Newton. When they called Newton himself, he inquired through his secretary what the topic of the interview would be. When told it would be "the Aladdin and Guido Penosi" he refused the interview. (A 38-39) The reporters also sought to interview Newton with the assistance of Moreno, of a public relations executive and of the news director of the local NBC affiliate in Las Vegas who was a friend of Newton's. (A 38-39 & n.36; RT 24:5113, 15:2878, 2890) Newton declined all such requests. The

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discussions about Newton, Piccolo and Penosi referred to the status of Newton's efforts to purchase the Aladdin (*e.g.*, Penosi: "they're throwing roadblocks and all that bullshit . . . you know . . . and, ah . . . they don't want him to have the hotel;" Piccolo: "Yeah, but it would be nice if [Newton] would." (A 23 n.23)

reporters met with two Nevada Gaming Board agents who were investigating Newton, but received little information (A 99-101), and they attempted, unsuccessfully, to interview Penosi at his apartment in Beverly Hills. (RT 25:5250-51, 9A:219A) Ross did learn, however, from a particularly knowledgeable confidential source that Piccolo had been asked by his associates in the Gambino family if he wanted to go in with them in Atlantic City and Piccolo said he did not because he had taken care of a problem for Wayne Newton and was going to have some sort of interest in the Aladdin with Newton. (A 27-30)

Investigation by the Nevada Gaming Authorities

While the NBC journalists were pursuing their investigation, the Nevada gaming authorities were conducting their own investigation of Newton. Newton answered questions under oath asked by several Nevada Gaming Board investigators led by Fred Balmer ("Balmer"), the senior of four Board investigators assigned to conduct the investigation of Newton. (A 23-24) Balmer asked Newton to set forth "his entire relationship with Mr. Penosi" (RT 11:1908-09) and gave Newton "a more than adequate opportunity during the interviews that we conducted with him to tell us anything that he knew about Mr. Penosi." (A 24 n.25) Newton told the agents only about seeing Penosi at the Copacabana Club and (misleadingly) that "Guido called me or I called him" about the threats in 1980. He falsely professed ignorance about any action taken by Penosi, stating that the threats to him had continued. (A 24-26) Newton did not tell Balmer of the threats to Moreno; of his own calls to Piccolo; or of speaking on two separate occasions with an individual in the east at Penosi's request in an effort to stop the threats;[6] nor did he tell Balmer about any of the other contacts that had

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6 At trial, Newton testified that he did not do so because "[i]t didn't occur to me." (A 26 n.26) Another Board agent testified, in regard to whether Newton mentioned making calls to associates or relatives of Penosi in the east, "He did not, and he was asked." (RT 16:3069)

occurred over the years between himself and Penosi. (A 26-27)

On September 25, 1980, the reporters attended a public hearing held by the Gaming Board. Newton testified generally about meeting Penosi at the Copacabana and seeing him in Florida, but testified falsely that Penosi never visited him in his home. (A 32 & n.30) Newton did not tell the Board about any of the other contacts between himself and Penosi, and particularly, Newton's request for assistance from Penosi and Piccolo. Newton falsely summed up his relationship with Penosi by stating: "In the approximately 21 years from the time I met him, I might have seen this man four times. So my relationship is just that of a fan, really." (A 33)[7]

At the Board hearing, the NBC journalists also heard representatives of the Valley Bank of Nevada testify that the Valley Bank was providing the financing for Newton to acquire his interest in the Aladdin.[8] On the basis of the sworn-to information provided to them, the Gaming Board recommended that Newton be licensed. (A 35) When Ross

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7 Newton's explanation at trial for the "four times" was that he had seen Penosi on four "occasions"—in New York for a number of months, in Florida on more than one occasion, in Las Vegas (for the wedding of his brother) and in Las Vegas again (in 1979 when Penosi visited that city). (RT 7:1107-08) Even this creative accounting by Newton omitted the 1976 meeting with Penosi in Los Angeles on the occasion of the television pilot Newton performed *gratis* as a favor to Penosi, their 1980 meeting in Las Vegas after the threats ended, and all the telephone communications between them.

8 At trial (and in his current petition) Newton claimed that because Ross and Silverman heard the testimony about the Valley Bank, they must have known that Piccolo could not have become a hidden partner in the Aladdin. However, as the testimony of Newton's organized crime expert, Prof. G. Robert Blakey, made plain, the fact that the Valley Bank provided the financing for the Aladdin did not begin to answer the question of whether any hidden interest existed. Prof. Blakey testified that a hidden interest in a casino is normally not actual ownership of a hotel but an interest in the "skim," the amount of casino receipts not reported to the appropriate authorities as receipts. Such an interest would not be reflected in corporate documents or materials "available for public surveillance and public review." (A 55)

and Silverman informed one of their law enforcement sources about Newton's testimony before the Gaming Board about Penosi, their source said that Newton was not telling the whole story. (A 31)

Immediately after the hearing, Ross sought, once again, to interview Newton. In response to questions from Ross, Newton falsely stated that he had last spoken with Penosi "maybe a year ago" and falsely stated that Penosi had made no telephone calls to him. (A 35, 120-21) Newton became visibly angry and did not respond to other questions posed by Ross as he followed Newton to a car in the parking lot. At the car, Ross asked Newton about threats made upon his family, inquiring whether Penosi had ever been in Las Vegas to provide protection for his children. Frank Fahrenkopf ("Fahrenkopf"), Newton's long-time attorney who had represented him in his successful effort to be licensed to own and operate the Aladdin, disparagingly replied, "[c]ome on, that's silly." No other answer or explanation was offered by Fahrenkopf or Newton then or at any time prior to filing suit. (A 35-36, 122)[9]

The following day, the Nevada Gaming Commission held its own hearing, approved the recommendation of the Gaming Board and granted Newton a license to own and operate the Aladdin. At the hearing, Fahrenkopf submitted an affidavit by Newton concerning Penosi which referred to Penosi's 1979 visit to Las Vegas and to Newton's appearance on the television pilot produced by Penosi's son. (A 36) The affidavit made no reference to any other aspects of the long-standing Newton-Penosi relationship—omitting, among other things, any reference to the assistance provided Newton by Penosi and Piccolo just months earlier, the fact that Newton credited them with saving his and his daughter's lives, and that Piccolo had already sought to start to "earn" from him. The affidavit was understood by members of the Commission

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9 At trial, it was revealed that not until after the Gaming Board hearing did Newton even disclose to his own lawyer Fahrenkopf *any* information about his relationship with Penosi. (RT 5:703-04, 713-14, 6:872-73, 7:1153-57)

to mean that Newton had had no connections with Penosi and his son other than as stated in the affidavit. (RT 30:6255)

Final Pre-Broadcast Preparation

Towards the end of their preparation of the broadcast, Ross and Silverman interviewed Johnny Carson, who had himself sought to purchase the Aladdin Hotel at an earlier time. Carson had no information of relevance to the broadcast. (A 36 & n.34)

When the reporters sent a telegram to Moreno advising him of their story, Moreno called Ross and said that Newton's contacts with Penosi had nothing to do with the purchase of the Aladdin, but concerned death threats against Newton and his family and that this matter would be fully disclosed in an affidavit being prepared by Fahrenkopf. (A 37-38)

When the affidavit was submitted, however, it contained nothing at all about threats. Newton himself had previously raised questions about Moreno's truthtelling by (as the Court of Appeals summarized) "testif[ying] falsely" that Moreno "was only a friend, that Moreno had no business or contractual position with him, and that Moreno was not his manager." (A 33-34). That testimony was wholly inconsistent with what Moreno had told Ross. Given the absence of any reference to threats in the affidavit, the questions raised about Moreno's credibility and, in particular, Fahrenkopf's authoritative dismissal (in Newton's presence) of the very notion that Newton had been threatened, the broadcast did not refer to threats.

The October 6, 1980 Broadcast

On October 6, 1980, the NBC Nightly News included, as a Special Segment, a report entitled "Wayne Newton and the Law." Penosi was described as "a New York hoodlum from the Gambino Mafia family, a man with a long criminal record, now believed to be the Gambino family's man on the

West Coast, in the narcotics business and also in show business." The broadcast noted that Penosi was a "key figure" in an ongoing federal grand jury investigation of the activities of the Gambino family in Las Vegas and that this investigation also involved Wayne Newton. Newton's purchase of the Aladdin was noted, as was the fact that a federal grand jury was investigating the role of Penosi and the mob in Newton's deal for the Aladdin. The broadcast stated accurately that Newton had had financial problems and it continued:

> "Investigators say that last year, just before Newton announced he would buy the Aladdin, Newton called Guido Penosi for help with a problem. Investigators say whatever the problem was, it was important enough for Penosi to take it up with leaders of the Gambino family in New York. Police in New York say that this mob boss, Frank Piccolo, told associates he had taken care of Newton's problem, and had become a hidden partner in the Aladdin hotel deal." (A 4)

The broadcast showed Newton testifying before the Gaming Board on the subject of his relationship with Penosi: "on the basis of which I've known him [Penosi], I don't think that there has been a relationship." The broadcast then stated that "[f]ederal authorities say Newton is not telling the whole story, and that Newton is expected to be one of the first witnesses in the grand jury investigation."[10] The broadcast concluded with Ross stating that "[f]ederal authorities say they know of at least 11 phone calls Penosi made to Newton's house in one two-month period" and asserting that these and other matters would be considered by a federal grand jury. (A 3-4, 88-92)

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10 The Court of Appeals, after marshalling all the relevant evidence, concluded that "[t]he record is clear that Newton, in fact, did not tell the whole story to Nevada state gaming authorities. . . . And the record reveals that NBC's statement was accurate, even without attribution to federal authorities." (A 41 n.38)

Subsequent Events

One month after the October 6 broadcast, Newton and Moreno testified before a federal grand jury in Connecticut. Newton was asked a number of questions about the relationship between his telephone calls to Penosi and Piccolo and his purchase of the Aladdin Hotel. (A 56 n.45) In the course of his grand jury testimony, Newton described in detail—as he had not done at all to the Nevada gaming authorities—his calls to Penosi's cousin "Frank;" his meeting with Penosi in his dressing room in February 1980 after the threats against him had ceased; his telling Penosi how appreciative he was that the threats had ended; and Moreno telling Newton that Frank had said that, as "a favor for getting [Moreno] off the hook," he wanted Moreno to take out an insurance policy on Lola Falana through a Connecticut insurance agent whose name was given to Moreno by Frank. Newton also testified before the grand jury that he understood that Frank asked for the insurance policy "as a *quid pro quo*, as a favor for him helping" Newton and Moreno. (ER 223-26)

On November 6, 1980, a portion of the NBC Nightly News narrated by Ross recounted Newton's appearance that day before the grand jury. (ER 74-76) Several months later, on June 12, 1981, Piccolo and Penosi were indicted by the grand jury for attempted extortion of Newton, Falana and Moreno. (A 39; ER 231-33) The indictment was the subject of a report that evening on the NBC Nightly News. (ER 84-86)[11]

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11 Piccolo was shot to death in a Bridgeport, Connecticut telephone booth in September, 1981. (Exs. 616, 840-45) Penosi was tried in March 1982, but the jury was unable to reach a verdict. Penosi was retried in May 1982 and acquitted (Ex. 634), having argued to the jury that it was Piccolo and not Penosi who had sought to extort money from Newton. (Ex. ABP at 42-56)

ARGUMENT

THERE IS NO CONFLICT IN THE CIRCUITS OR BETWEEN THE RULING OF THE COURT OF APPEALS AND ANY RULING OF THIS COURT WHICH WARRANTS PLENARY CONSIDERATION BY THIS COURT

The petition sets forth three questions purportedly raised by the unanimous ruling of the Court of Appeals. Not one is the subject of any conflict among the circuits or between the court that rendered it and any other federal or state court. Nor does the petition even claim that any such conflict exists.

What the Court of Appeals did in this case was singularly unexceptional and unexceptionable. After detailed examination of the entire record in this action, it applied the well-established and not at all controversial rule of law " 'that in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 . . . (1984) (quoting *New York Times* [*Co.* v. *Sullivan*,] 376 U.S. [254,] 284-286 [(1964)] . . .)." *Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990).

There is, of course, some tension between the constitutional obligation of independent review and the deference usually accorded by appellate courts to findings of fact made by a jury. This tension was most recently addressed and resolved in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989):

> "Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of witnesses,' *Bose*, 466 U.S., at 499-500, the reviewing court must ' "examine for [itself] the statements in issue and the circumstances under which they were made to

> see . . . whether they are of a character which the principles of the First Amendment . . . protect,'' ' *New York Times Co.*, 376 U.S., at 285 (quoting *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946)).''

The petition does not allege that the Ninth Circuit ruling in this action is in any way inconsistent with this standard of appellate review. In fact, the record before the Court was, in almost all respects, undisputed; the decision was based on evidence as incontrovertible as FBI and Nevada Gaming Board tapes, the transcript of Newton's grand jury testimony, and Newton's own admissions at trial. As the court concluded:

> ''In sum, almost all of the facts reported by NBC in the October 6, 1980 broadcast are uncontroverted. Newton went to Penosi with a problem and Penosi called Piccolo who helped solve the problem. Piccolo and Penosi later discussed 'earning off' Newton and possibly 'earning off' his ownership of the Aladdin Hotel. Piccolo and Penosi were investigated and indicted by a federal grand jury, which heard the testimony of Wayne Newton. All these facts are beyond dispute.'' (A 39)

The petition does not allege otherwise.

Instead the petition argues that the opinion of the Ninth Circuit conflicts with Justice Scalia's concurrence in *Harte-Hanks*, which contends that an appellate court's ''independent assessment of whether malice was clearly and convincingly proved'' should be based upon ''the assumption that the jury made all the supportive findings that it reasonably could have made.'' 491 U.S. at 700.[12]

The argument of the petition, however, is misplaced, *for the Ninth Circuit did not reject any relevant subsidiary factual finding that a jury could reasonably have made.* The petition attempts to evade this decisive point by resorting to a

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12 By contrast, the opinion for the Court in *Harte-Hanks* considered ''the undisputed evidence'' and deferred to only certain ''findings'' that ''the jury *must* have'' accepted. *Id.* at 690-91.

scattered array of allegations, none of which, even if fully credited, refer to subsidiary findings of fact which a jury could reasonably have made and which could support a constitutional inference of actual malice. These allegations fall into two general categories.

The first category consists of those allegations that do not refer to disputed facts, but instead contest the legal implications of facts that are non-controverted. An example is the petition's discussion of Ross and Silverman's interview of Johnny Carson. (Pet. at 16-17) Apart from its distortion of the record,[13] this discussion does not refer to any disputed subsidiary issue of fact at all.[14] It simply leaps by sheer force of will from the unremarkable fact that the reporters interviewed a potentially newsworthy source (who in the end could provide no information), to the ultimate *legal* conclusion of actual malice.[15]

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13 The petition states that "Carson testified that he could not remember being asked any questions" (Pet. at 16), when in fact Carson testified that "[t]hey may have asked questions if I knew anything about what was going on and I said, no . . . . Whether they asked any questions, I do not recall." (A 137) The petition states that "the reporters had already drafted the broadcast's script before going to Carson's home" (Pet. at 16), whereas in fact the evidence establishes only that the reporters had "worked" on a "draft" of the script before meeting Carson. (A 139-40) Petitioner similarly attempted to distort Carson's testimony in his brief to the Ninth Circuit. (A 36 n.34)

14 There is no evidence in the record from which a reasonable jury could have found, as a subsidiary fact, that a relationship existed between the NBC reporters and Carson so as to motivate the reporters falsely to defame Newton. It is uncontroverted that the reporters had never met Johnny Carson prior to working on the story; that Carson had made no request that the story be covered and had offered no suggestions about what it should say; and that both before and after the broadcasts Carson had not the faintest idea who the reporters were. (RT 16:3180-82, 23:4760-64, 4804, 4864, 24:5101-02)

15 The desperation of this leap is finely illustrated by the petition's citation to *Harte-Hanks*' unexceptional conclusion that it is probative of

The petition makes a similar point in its reference to Ross's purported agitation after Newton's testimony before the Nevada Gaming Board and during Ross's attempt to interview Newton immediately afterwards. Newton's remarks on both these occasions were, as the Ninth Circuit tactfully put it, false. (A 32-35) There is no factual dispute that, having witnessed Newton responding falsely to questions of the gaming authorities, that Ross aggressively sought to probe Newton's responses to the questions he had been asked. With respect to this incident, the petition's real complaint, therefore, is that the "Ninth Circuit . . . refused to regard" Ross's supposed agitation as "probative of actual malice."[16] (Pet. at 19-20) Newton's claim is thus nothing more or less than that the Ninth Circuit incorrectly applied the constitutional standard of actual malice. Plainly, this has nothing whatever to do with Justice Scalia's concurrence in *Harte-Hanks*.[17] Neither the definition nor the application of

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actual malice to establish that journalists are committed to defamatory accusations in advance of their purported investigation of those accusations. This conclusion has no relevance whatever to the interview of Johnny Carson, which was, on the basis of all the evidence, a routine part of the reporters' newsgathering efforts. (A 36 & n.34)

16 Once again, the desperation of the petition's citation to *Harte-Hanks* should not slip by unnoticed. *Harte-Hanks* reached the commonsense conclusion that evidence establishing that journalists deliberately refused to interview a crucial witness, in the context of other evidence establishing a pattern of reckless indifference to the truth, can be probative of actual malice. The petition attempts to bring this case within that conclusion by fantastically transforming Newton's evasion of Ross's attempted interview into a "request to conduct an interview at another time and place." (Pet. at 20; but see A 121) In so doing, however, the petition conveniently overlooks the undisputed evidence that Newton had repeatedly rebuffed numerous previous efforts to interview him. (*See* p. 8, *supra*.)

17 Several of the petition's allegations, when analyzed, are similar. They ultimately represent petitioner's disagreement with the legal significance that the Ninth Circuit attributed to undisputed facts. Included within this category are, for example, the petition's allegations that Ross and Silverman had heard that the Valley Bank was financing Newton's purchase of the Aladdin Hotel. (Compare Pet. at 22 with A 54-55 and p. 10 & n.8, *supra*.)

the legal standard of actual malice was at issue in *Harte-Hanks*. And, in fact, neither the legal definition of actual malice nor the application of that standard to the facts of this case are even asserted by Newton to be "Questions Presented."[18]

The second category of allegations contained in the petition consist of those which refer to peripheral and immaterial factual disputes, whose resolution would be irrelevant even to a legal determination of actual malice. A good example is the petition's reference to the factual dispute, considered by the Ninth Circuit, surrounding the source of Ross's knowledge of police information about Piccolo. (Compare Pet. at 21-22 with A 27-30) The Ninth Circuit left this dispute unresolved because its settlement was irrelevant to a legal determination of actual malice. Even if the Ninth Circuit were fully to credit the testimony of the New York City police officials who stated that they could not locate records of overheard conversations between Piccolo and other mob figures on the subject of Piccolo's association with Newton and the Aladdin Hotel, the most that would follow is that the broadcast's attribution of the New York police as the source of its information would be called into question. What cannot be questioned, however, is the reality of the relevant FBI wiretaps, introduced into evidence by Newton himself. (*See* p. 7 n.5, *supra*) No question of actual malice could possibly hinge on

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18 "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law . . . . In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full." *Harte-Hanks*, 491 U.S. at 685, 688. Impeachment of the Ninth Circuit's conclusions regarding actual malice, therefore, would require the petition to assess the Circuit Court's evaluation of the entire record. Given the Ninth Circuit's careful and comprehensive mastery of the voluminous but generally indisputable evidence in this case, the petition does not and can not attempt this task, preferring instead to chip away at minor and discrete points. But because actual malice can neither be established nor negated by this method, the petition is thereby also forced inaccurately to characterize its challenge to the Ninth Circuit in terms of the appropriate scope of independent review.

where statements made by Piccolo evidencing his illicit plans reposed.[19]

The allegations contained in the petition, therefore, do not fairly turn on any legal question left open by *Harte-Hanks*, or on any conceivable conflict with Justice Scalia's concurrence in that case. Nor does the ruling of this Court in *Masson* v. *New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991), have anything to do with this case. Whatever questions may still remain in libel cases as to the legal impact of misquoting sources, no such issue is or could conceivably be raised here. As for the suggestion in the petition that *Masson* somehow alters the guidelines of *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), and *Harte-Hanks*, nothing in *Masson* lends any support at all to that contention.

In *Masson* summary judgment had been granted by a trial court in favor of a defendant in an action for defamation. This Court enunciated and applied the ordinary legal standards appropriate to summary judgment. These standards express Seventh Amendment concerns that plaintiffs be accorded every reasonable opportunity to have their full day in court. For this reason *Masson* held that in evaluating a motion for summary judgment a trial judge should "draw all justifiable inferences in favor of the nonmoving party,

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19 Another allegation that concerns an irrelevant factual dispute is the petition's claim that Ross and Silverman knew at the time of the broadcast that the "problem" for which Newton sought Penosi's assistance concerned threats made against Newton and his daughter. (Pet. at 17-18) Entirely aside from the fact that Newton's lawyer (in Newton's presence) ridiculed the very notion of Newton having been threatened (p. 11, *supra*), acceptance of the petition's version of events carries, as the Ninth Circuit held, no implications for a legal determination of actual malice. Any broadcast containing the disputed information "would have been no less defamatory than the October 6, 1980 broadcast itself." (A 46) The message would remain that Newton was applying for a license to own and operate a casino while indebted to organized crime figures and while seeking to deceive Nevada gaming authorities about his relationship with those crime figures.

including questions of credibility and of the weight to be accorded particular evidence." *Masson*, 111 S. Ct. at 2435.

The standards enunciated in *Bose* and *Harte-Hanks*, on the other hand, serve a completely different function. They are designed to enable an appellate court to fulfill its First Amendment responsibility independently to review the entire record in decisions where expression has been penalized. This is not an issue of denying a libel plaintiff his day in court, but rather of assessing the constitutional significance of the evidence produced in court. *Harte-Hanks*, 491 U.S. at 686. Appellate courts cannot conduct that assessment using the standards of deference appropriate to the evaluation of a motion for summary judgment, for such standards are inconsistent with the "rule of independent review" that "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." *Bose*, 466 U.S. at 501.

Thus this Court has never intimated, and certainly did not intimate in *Masson*, that the ordinary standards of summary judgment in any way conflict with the established rule of independent review. The petition's contention to the contrary is without merit.

Equally so is Newton's contention that this case raises the question of whether a reviewing court may evaluate the proof of actual malice "upon its own statement-by-statement interpretation of the subject television broadcast" when that "interpretation conflicts with the overall meaning derived by the average member of the intended audience." (Pet. at i) Newton himself argued (and the jury concluded, A 85-86) that specific factual assertions in the broadcast were false and made with actual malice. That being so, the Court of Appeals had no alternative but to consider each statement potentially at issue.

The Court of Appeals, in any event, dealt elsewhere in its opinion with Newton's argument that NBC sought to leave a false "impression" about him by the entirety of its broadcast. (A 40-45) Newton himself had acknowledged (and urged the district court to charge the jury, as it did) that NBC

could not be held liable for leaving any false impression unless it had intended to do so. (A 126) The Court of Appeals reviewed the evidence on this issue, found no evidence supporting the notion that NBC had any such intent and rejected the erroneous view of the district court that such intent could be automatically and mechanically inferred from particular implications the district court believed it could find in the broadcast. (A 45) On the basis of its application of the very legal standard urged by Newton, then, the Court of Appeals correctly determined that any such finding of intent was insupportable.

CONCLUSION

In the end, Newton has set forth no issues (a) in conflict in the circuits; (b) as to which the Court of Appeals deviated from any ruling of this Court; or, in fact, (c) genuinely raised by this case. Newton is thus reduced to rearguing a series of disconnected factual assertions which—their frequent falsehood aside—do not provide this Court with a case worthy of its consideration.

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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